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Res Judicata - Criminal Law - Double Jeopardy - DUI

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RES JUDICATA—CRIMINAL LAW—DOUBLE JEOPARDY—DUI—The Pennsylvania Supreme Court has decided that the Commonwealth must appeal every final order of a district magistrate; otherwise, res judicata bars any subsequent action.

Commonwealth v La Belle, Pa , 612 A2d 418 (1992).

On June 2, 1985, Lawrence Todd La Belle was involved in a one-car accident.[1] Eight days after this accident, the Commonwealth charged La Belle with driving under the influence of alcohol (DUI) in violation of the Pennsylvania Vehicle Code.[2] Fifteen days after the accident, the Commonwealth also charged La Belle with driving at an unsafe speed and reckless driving in violation of the state's Vehicle Code.[3] On August 23, 1985, La Belle pleaded guilty to driving at an unsafe speed and reckless driving.[4] La Belle appeared before a district magistrate on August 25, 1985, and the

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1. *Commonwealth v La Belle*, Pa , 612 A2d 418 (1992). Immediately before the accident, La Belle purchased gasoline at a truck stop complex. *Commonwealth v La Belle*, 397 Pa Super 179, 579 A2d 1315, 1316 (1989). Subsequently, La Belle drove his car through the complex's parking lot in a reckless and erratic fashion. *La Belle*, 579 A2d at 1316. La Belle then stopped at the restaurant in the complex to purchase soda. Id. A witness saw La Belle pour the soda into a liquor bottle. Id. La Belle drove away squealing the tires of his car; the accident occurred shortly thereafter. Id. La Belle was found to have a blood alcohol level of .24% Id. The only individual injured in the accident was La Belle's passenger, Mary Ellen Conaboy, who was rendered a quadriplegic. Id.

2. *La Belle*, 612 A2d at 419. The offense in Pennsylvania of DUI is defined at 75 Pa Cons Stat § 3731 (Purdon 1992). Section 3731 provides:

> A person shall not drive operate or be in actual physical control of the movement of any vehicle while:
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> (1) under the influence of alcohol to a degree which renders the person incapable of safe driving;
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> (2) under the influence of any controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act," to a degree which renders the person incapable of safe driving;
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> (3) under the combined influence of alcohol and any controlled substance to a degree which renders the person incapable of safe driving; or
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> (4) the amount of alcohol by weight in the blood of the person is .10% or greater.

75 Pa Cons Stat Ann § 3731(a).

3. *La Belle*, 612 A2d at 419. The offense of driving at an unsafe speed and reckless driving in Pennsylvania is defined at 75 Pa Cons Stat Ann § 3714. Section 3714 provides: "Any person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary offense." 75 Pa Cons Stat Ann § 3714 (Purdon 1992).

4. *La Belle*, 612 A2d at 419.

magistrate dismissed the DUI charge.[5] The district magistrate quashed the charge based on the superior court's holding in *Commonwealth v Revtai*[6] that stated when a DUI charge is not filed within five days, as required by Pennsylvania Criminal Procedure Rule 130,[7] the court is compelled to dismiss the charge.[8]

Subsequent to La Belle's dismissal, the superior court on March 6, 1987 overruled *Revtai* in *Commonwealth v Schimelfenig*.[9] In *Schimelfenig*, the superior court held dismissal of a case based on a late complaint under Rule 130(d) occurred only upon a showing that the defendant had been prejudiced by the delay.[10] Because *Revtai* was overruled, the Commonwealth refiled (within the statute of limitations) the DUI charge against La Belle on March 18,

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5. Id.

6. 343 Pa Super 149, 494 A2d 399 (1985), rev'd, 516 Pa 53, 532 A2d 1 (1987). In this case, the defendant was arrested on May 25, 1983 and charged with DUI. *Revtai*, 494 A2d at 400. Revtai was not brought immediately before the issuing authority. Id. The Commonwealth released Revtai without an arraignment pursuant to Pa R Crim P Rule 130(b), but the Commonwealth filed a complaint six days after the arrest. Id. The court dismissed the DUI charge holding that a defendant has the right to rely on specific time limitations as stated by the Criminal Rules Committee. Id.

When the Pennsylvania Supreme Court indicated its approval of the superior court's decision to overrule *Revtai*, it indicated its strong disapproval of the superior court's rationale in deciding that case. *Commonwealth v Revtai, et al*, 516 Pa 53, 532 A2d 1, 3 (1987). The state supreme court held that the superior court interpreted incorrectly Rule 130(d) and failed to apply Rule 150. Id. The pertinent section of Rule 150 states: "[a] defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, summons, or warrant, or a defect in the procedures of this chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant." PaRCrP Rule 150, 42 Pa Cons Stat Ann (Purdon 1989).

7. The relevant sections of Rule 130 state:

> (a) Except as provided in paragraphs (b) . . . when a defendant has been arrested without a warrant in a court case, a complaint shall be filed against the defendant and the defendant shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay.
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> (b) When a defendant has been arrested without a warrant for driving under the influence of alcohol or controlled substances, the arresting officer may, when he deems it appropriate, promptly release the defendant from custody rather than taking him before the issuing authority.
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> . . .
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> (d) When a defendant is released pursuant to paragraphs (b) . . . a complaint shall be filed against the defendant within five (5) days of the defendant's release. Thereafter, a summons, not a warrant of arrest, shall be issued and the case shall proceed as provided in Rule 110.

PaRCrP Rule 130(d), 42 Pa Cons Stat Ann (Purdon 1989).

8. *La Belle*, 612 A2d at 419.

9. 361 Pa Super 325, 522 A2d 605 (1987). The Pennsylvania Supreme Court shortly thereafter affirmed the superior court's overruling of *Revtai*. See note 6.

10. *Schimelfenig*, 522 A2d at 609.

1987.[11] The trial court quashed the charge on double jeopardy grounds because La Belle had pled guilty of driving at an unsafe speed and reckless driving. The superior court, however, reversed the trial court's decision leading to this appeal.

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11. *La Belle*, 612 A2d at 419. The trial court quashed the charge on double jeopardy grounds. *La Belle*, 579 A2d at 1316. The superior court reversed this decision. Id. The issue the superior court dealt with was whether La Belle's guilty plea to summary offenses of driving a vehicle at an unsafe speed and reckless driving in violation of the vehicle code preclude the Commonwealth from maintaining a subsequent action, arising from the same accident, against La Belle for DUI. Id.

The superior court focused on double jeopardy clause with respect to La Belle's guilty plea to reckless driving and driving at an unsafe speed. *La Belle*, 579 A2d at 1320.

The relevant part of Amendment V is no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . ." US Const, Amend V.

Double jeopardy is defined as:

> Fifth Amendment guarantee, enforceable against the states through the Fourteenth Amendment, protects against second prosecution for same offense after acquittal or conviction, and against multiple punishments for same offense. The evil sought of be avoided is double trial and double conviction, not necessarily double punishment.

Black's Law Dictionary 91 (West, 6th ed 1991).

The superior court's double jeopardy analysis of this case began with the test established by the Supreme Court in *Blockburger v United States*, 284 US 299 (1932). Justice Sutherland, writing for the United States Supreme Court, noted that:

> the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 US at 304.

The superior court emphasized that the Blockburger test focuses on the statutory elements of the offense at issue. *La Belle*, 579 A2d at 1320. Furthermore, the court stated that if one offense, as defined by the statute, requires additional proof beyond the other offense, as defined by the statute, the Blockburger test is satisfied irrespective of the substantial overlap between the two crimes. Id at 1320 citing *Iamelli v United States*, 420 US 770, 785 n 17 (1975).

The court held that the blood alcohol level is an essential element of DUI but not an essential element of reckless driving. *La Belle*, 579 A2d at 1323. In addition, the court noted that the act of driving a vehicle is an essential element of reckless driving while this element is not an essential element of DUI because section 3731 was amended in 1982 to include driving, operating, or controlling the movement of the vehicle. Id. Therefore, the court asserted that the prosecution passed the Blockburger test. Id.

The superior court noted that in addition to the Blockburger test, double jeopardy "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *La Belle*, 579 A2d at 1320. Thus, the court concluded that the double jeopardy clause barred the state from any subsequent indictment when the prosecution proved conduct (to establish the prima facia case of the offense charged), for which the defendant had already been prosecuted. Id.

The court also noted that La Belle failed to demonstrate that his first conviction had been based upon his blood alcohol level or the affect of alcohol on his driving. Id. Therefore, the court reasoned that the charges brought against La Belle were not barred by double jeopardy. Id.

The Pennsylvania Supreme Court concentrated on the issue of whether res judicata barred the Commonwealth from filing DUI charges against the defendant when this charge was previously dismissed by a district magistrate and the Commonwealth failed to appeal this dismissal.[12]

The Commonwealth, however, argued that the earlier dismissal was not final but interlocutory, and thus, it was not appealable.[13] The Commonwealth noted that "the general rule . . . that an order dismissing a case for failure to establish a prima facie case is not final because the prosecution can bring the case before any other officer empowered to hold a preliminary hearing."[14] The court agreed with the Commonwealth's general rule; however, it disagreed that it applied to this case.[15]

Justice Flaherty, writing the majority opinion for the court, indicated that a prima facie case dealt with the presentation of evidence which, if true, would sustain the charge.[16] Justice Flaherty noted "[t]raditionally, the failure to make a prima facie case has been treated as an interlocutory matter, for at the time it is determined that the prosecution's evidence is deficient, jeopardy has not attached and the state is not out of court because of the adverse determination."[17] Under this rule, the Commonwealth could add to its evidence and resubmit the charges against the defendant.[18]

The court, however, refused to apply this rule to the present case because it was dismissed based on the application of a rule of law handed down by the superior court to the facts of this case.[19] The supreme court noted that under the elements of the present case, the Commonwealth could not have added to its evidence and resubmitted to another magistrate to cure the defect.[20] Justice Fla-

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12. *La Belle*, 612 A2d at 419. This issue was addressed by Judge Brosky in his dissenting opinion for the superior court. *La Belle*, 579 A2d at 1324. Brosky asserted that the majority opinion overlooked the concept of res judicata. Id. Brosky noted that the Commonwealth's failure to comply with Rule 130(d) was final but an appealable decision. Id. However, because the Commonwealth failed to appeal this order, the decision "became final, in essence, forevermore." Id.

13. *La Belle*, 612 A2d at 419.

14. Id at 419 citing *Commonwealth v Hetherington*, 460 Pa 17, 331 A2d 205 (1975).

15. *La Belle*, 612 A2d at 419-20. The supreme court indicated that rearresting the defendant was the appropriate procedure when charges were dismissed due to failure to establish a prima facie case because such a determination is interlocutory in nature, and therefore, not appealable. Id.

16. Id at 420.

17. Id.

18. Id.

19. Id.

20. Id. The state supreme court indicated that the error was curable only if the mag-

herty asserted that the proper remedy was to have appealed the magistrate's dismissal.[21] Because the Commonwealth failed to appeal this dismissal, res judicata barred the Commonwealth from recharging the defendant.[22]

The Commonwealth's second argument was based on Rule 150 of Pennsylvania's Rules of Criminal Procedure as interpreted by *Commonwealth v Mirarchi*.[23] The Pennsylvania Supreme Court in *Mirarchi* held that "where . . . dismissal of the charges and discharge of the defendant resulted from a determination that the complaint contained a 'substantive defect' rearrest was an appropriate, if not the only procedure available to the Commonwealth."[24] The Commonwealth in *La Belle* asserted that the violation of the five day rule was a "substantive defect" in the complaint thus permitting the Commonwealth to refile the charges against La Belle.[25] The court dismissed this argument stating that defects in the complaint were not an issue.[26] Justice Flaherty indicated that this argument did not apply to the case at bar; instead, the primary issue was whether the Commonwealth may refile the charges against the defendant when the state failed to appeal a final order that dismissed the charges against the defendant.[27]

In this decision, the Pennsylvania Supreme Court applied the predominantly civil doctrine of res judicata to a criminal case; however, the common law doctrine of res judicata or collateral estoppel[28] has been applied to criminal cases dating back to late

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istrate's application of superior court's rule had been in error or unless the superior court's rule was itself an error. Id.

21. Id. Justice Flaherty supported his position by noting two rules of law. Id. First, if a magistrate when dismissing a case committed an error of law, the proper remedy was to appeal that decision. Id. Second, if an appellate court established an incorrect rule of law, the magistrate must nonetheless apply that rule, and the proper remedy was to appeal to the appellate court to seek reversal of its rule. Id.

22. Id.

23. Id at 420 n 1. When *Commonwealth v Mirarchi*, 481 Pa 385, 392 A2d 1346 (1978), was decided, Rule 150 provided: "[i]f a complaint, citation, summons or warrant contains a substantive defect, the defendant shall be discharged unless he waives the defect. Nothing in this rule shall prevent the filing of a new complaint or citation and the issuance of process in which the defect is corrected in a proper manner." PaRCrP Rule 150, 42 Pa Cons Stat Ann (Purdon 1969) as quoted in *Mirarchi*, 392 A2d at 1347 n 1. The Pennsylvania legislature amended Rule 150 in 1981; see note 6 for the present text of this rule.

24. *La Belle*, 612 A2d at 420 n 1 quoting *Mirarchi*, 392 A2d at 1348.

25. *La Belle*, 612 A2d at 420 n 1.

26. Id.

27. Id. Justice McDermott noted his dissent. Id at 420.

28. The term "res judicata" embraces the effect of a judgment precluding the parties and their privies from relitigating in a subsequent action a controversy or issue already decided by a former judgment. *Res Judicata-Criminal Cases* 9 ALR3d 213 (1966).

nineteenth century England. In *Wemyss v Hopkins*,[29] the English court stated the well-established common law rule of res judicata as: where a person has been convicted and punished for a crime by a court of competent jurisdiction, the conviction barred subsequent proceedings for the same offense.[30] Otherwise, the court reasoned there might be two different punishments for the same offense.[31]

The English courts expanded the application of res judicata to criminal cases in *The Queen v Miles*.[32] The defendant in that case had been brought before a court of summary jurisdiction on four counts of assault and released when he agreed to good behavior.[33] Subsequently, the defendant was charged with the identical charges and brought before the central criminal court.[34] The court considered the issue of whether the doctrine of res judicata barred the proceeding in the central criminal court when the defendant had already been tried before a court of summary jurisdiction.[35] The court dismissed the charges and stated that a person who had

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The rule of collateral estoppel is an aspect of the broader principle of res judicata. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future suit. *Ashe v Swenson*, 397 US 436, 443 (1970). Even if the offense charged is not exactly the same as the one previously tried, the principle of collateral estoppel bars relitigation by the parties of issues actually determined at the previous trial. *Ashe*, 397 US at 443-44.

To have the effect of res judicata, a judgment in a criminal case must have been rendered in a judicial trial. Id. As with a civil action, the doctrine of res judicata in criminal cases applies to subsequent criminal proceeding only where both proceedings are identical. *Commonwealth v Quaranta*, 295 Pa 264, 145 A 89 (1928).

The doctrine of res judicata as applied to criminal cases was not fully appreciated in all jurisdictions. Marlyn E. Luger, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L Rev 317, 329 (1954). In addition, several jurisdictions did not apply res judicata as a separate concept of double jeopardy until the mid twentieth century. Luger, 39 Iowa L Rev at 329. In fact, most treaties and casebooks fail to discuss the application of res judicata to criminal law. Id.

29. 38 LR QB 378 (1875). In *Wemyss*, the defendant was summarily convicted for unlawfully and willfully striking a horse ridden by the victim. *Wemyss*, 38 LR QB at 378. Thereafter, the defendant was convicted under the same facts for unlawfully assaulting victim. Id. *Wemyss* was not the first English case that considered res judicata to criminal law. The *Duchess of Kingston Case*, 20 St Tr 355 (1776), was the first case that discussed the application of res judicata to a criminal case.

30. *Wemyss*, 38 LR QB at 381.

31. Id.

32. 24 QBD 423 (1890).

33. *Miles*, 24 QBD at 423-24. The charges against the defendant were: unlawfully and maliciously wounding the victim, unlawfully inflicting grievous bodily harm on the victim, assaulting the victim causing him actual bodily harm, and a common assault on the victim. Id at 423.

34. Id.

35. Id at 424.

been convicted of assault by a court of summary jurisdiction but had been discharged without any sentence of fine or imprisonment cannot thereafter be convicted on an indictment for the same charges.[36]

The United States Supreme Court, citing the *Miles* case, first applied the doctrine of res judicata to a criminal case in *United States v Oppenheimer*.[37] In this case, the defendant, along with several others, had been indicted for a conspiracy to conceal assets from a trustee in bankruptcy.[38] However, the court held that the one-year statute of limitations to bring such a charge had run.[39] Subsequently, in *Commonwealth v Rabinowich*,[40] the court held that the statute of limitations for this act had been incorrectly applied.[41] The government refiled the charges against the defendant and argued that the doctrine of res judicata did not exist for criminal cases except within the Fifth Amendment of the Constitution.[42] The Court held that, even though jeopardy had not attached, a plea that the statute of limitations had run was a plea to the merits.[43] Thus, the Court reasoned that once there had been a final judgment, the government could not refile the charges against the defendants.[44] The Court indicated that the proper remedy for the government was to appeal the decision to dismiss the case based on the judgment that the statute of limitations had run.[45]

The Supreme Court expanded the criminal law aspect of res judicata in *Ashe v Swenson*.[46] In this case, the Court first applied

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36. Id at 425-26.

37. 242 US 85 (1916).

38. *Oppenheimer*, 242 US at 85.

39. Id at 86.

40. 238 US 78 (1915).

41. *Oppenheimer*, 242 US at 86.

42. Id at 87. See note 11 for the relevant section of Amendment V and the definition of double jeopardy.

43. *Oppenheimer*, 242 US at 87.

44. Id at 87-88. The Court also noted that the Fifth Amendment was not intended to do away with the civil law principle that when a person has been acquitted on the merits, the government was barred from prosecuting the defendant a second time on an identical charge. Id.

45. Id.

46. 397 US 436 (1970). In this case, on January 10, 1960 six men were playing poker. *Ashe*, 397 US at 437. Three or four armed masked men suddenly appeared. Id. These men subsequently robbed the poker players. Id. The men escaped in a car that was later discovered abandoned a few miles from the robbery site. Id. Later, a state trooper arrested three men who were walking on the highway not far from the abandoned car. Id. The defendant, however, was arrested by another officer a short distance from the others. Id. It was never clear whether there were three or four robbers. Id.

collateral estoppel to a criminal trial.[47] The defendant was indicted for robbery of one individual, but at the trial the jury found the defendant not guilty based on insufficient evidence.[48] Six weeks later, the state brought the defendant to trial for robbery of another individual during the same incident as the first case.[49] The defendant was found guilty and sentenced to thirty-five years in jail.[50] The defendant appealed.[51] Upon granting the defendant writ of certiorari, the court considered the issue of whether a State is permitted to indict the defendant on robbery charges when a jury had already determined that the defendant was not the robber.[52]

Justice Stewart, who wrote the majority opinion, noted that the doctrine of collateral estoppel represented an important aspect of American jurisprudence.[53] He declared that collateral estoppel was part of the defendant's Fifth Amendment guarantee against double jeopardy.[54] Justice Stewart concluded that applying collateral estoppel to criminal cases will prevent a defendant who had already been convicted from having to "run the gantlet [sic]" another time.[55] The Court concluded that even though the second trial dealt with the robbery of a different individual, the name of this victim had no affect on the issue of whether the defendant was actually the robber.[56]

Unlike the United States Supreme Court, the Pennsylvania courts began to develop the doctrine of res judicata at an earlier

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47. Id at 442.

48. Id at 438-39. The defendant was charged with seven separate offenses- six counts of robbery for each poker player and theft of an automobile. Id at 438. The instant case dealt with a robbery charge against one of the robbers. Id. None of the poker players who testified ever saw the face of the defendant. Id.

49. Id at 439. At the second trial, the witnesses were basically the same; however, their testimony was stronger in the second prosecution than it was in the first prosecution. Id at 439-40.

50. Id at 440.

51. Id at 440-41. The defendant prior to this case, appealed his criminal conviction to the Missouri Supreme Court which affirmed the conviction. *State v Ashe*, 403 SW2d 589 (Mo 1966). Subsequently, the defendant brought a federal habeas corpus proceeding, but the district court denied this writ. *Ashe v Swenson*, 289 F Supp 871 (WD Mo 1967). The court of appeals affirmed. *Ashe v Swenson*, 399 F2d 40 (8th Cir 1968).

52. *Ashe*, 397 US at 446.

53. Id at 443.

54. Id at 445. Chief Justice Burger in his dissenting opinion argued that collateral estoppel is not inherent in the Fifth Amendment guarantee against double jeopardy. Id at 464. He asserted that if collateral estoppel was a part of the Fifth Amendment, the American courts have ignored this fact for over two centuries. Id (Burger Dissenting).

55. Id at 446.

56. Id at 446.

date in *Dinkey v Commonwealth*.[57] The *Dinkey* court considered whether it should sustain a defendant's plea of autrefois acquit[58] when the defendant was acquitted of seduction but subsequently charged with fornication and bastardy.[59] The state supreme court noted the principle that "[t]he right not to be put in jeopardy a second time for the same cause, is as sacred as the right of trial by jury, and is guarded with as much care by the common law and by the constitution."[60] The court indicated that seduction was an aspect of both fornication and bastardy.[61] The court determined that the former acquittal barred the commonwealth from charging the defendant a second time.[62] Thus, the supreme court reasoned that the issue of the defendant's guilt or innocence had already been fully litigated, and therefore, a second prosecution should be barred.[63]

The Pennsylvania Supreme Court further expanded the doctrine of res judicata with regards to criminal law in *Commonwealth v Lloyd*.[64] In *Lloyd*, the court considered the issue of whether the Commonwealth could bring a charge of bastardy in one county when the defendant had been acquitted in a preceding trial in another county for the same offense.[65] The defendant entered a plea

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57. 17 Pa 126 (1851). The court did not specifically state it was applying the doctrine of res judicata; nonetheless, the court applied the collateral estoppel aspect of res judicata without labeling it as such. See note 28. In *Dinkey*, the defendant was first charged with the offense of seduction. *Dinkey*, 17 Pa at 127. The defendant was acquitted on this charge. Id at 126. Subsequently, the Commonwealth charged the defendant with fornication and bastardy. Id at 128. The defendant entered a plea of autrefois, but the court convicted the defendant of fornication and bastardy, and the defendant appealed. Id.

58. Autrefois convicts is defined as "[f]ormerly convicted. A plea by a criminal in bar to an indictment that he has been formerly convicted of the same crime." *Black's Law Dictionary* 91 (West, 6th ed 1991).

Autrefois acquit is defined as "[f]ormerly acquitted. The name of a plea in bar to a criminal action, stating that the defendant has been once already indicted and tried for the same alleged offense and has been acquitted." *Black's Law Dictionary* 91 (West, 6th ed 1991).

59. *Dinkey*, 17 Pa at 128.

60. Id.

61. Id at 130.

62. Id.

63. Id.

64. 141 Pa 28 (1891). In this case, the Commonwealth brought the charges of bastardy and fornication against the defendant in Luzerne County. *Lloyd*, 141 at 29. The child, who was born as a result of this charge, was born in Lackawanna County. Id. The court noted that the law required the charges of bastardy to be brought in the county where the child was born. Id. Therefore, the court acquitted the defendant of the bastardy charge but convicted him of fornication. Id. The Commonwealth subsequently charged the defendant in Lackawanna County of the bastardy charge. Id at 29-30.

65. Id.

of autrefois convict.[66] The court noted that fornication and bastardy crimes resulted from the same single act.[67] The court asserted that the Commonwealth was prevented from prosecuting the defendant in one county for the bastardy charge and another county for the fornication charge because these charges were inseparable.[68] The court concluded that the state was bound by its decision to indict the defendant in the first county.[69]

The Pennsylvania courts, however, did not establish rules for applying res judicata to criminal cases until *Commonwealth v Moon*.[70] In this case, the superior court expounded that a verdict and judgment under an indictment was considered a final adjudication of the defendant's guilt or innocence.[71] The court declared this rule applied both to trials that ended in convictions and trials that ended in acquittals.[72] Based on the common law doctrine of res judicata, the court asserted that under such circumstances the state was not permitted to refile the charges against the defendant.[73] If the government did refile charges under such circumstances against the defendant, the court noted the defendant would be permitted to enter a plea of autrefois convict or autrefois acquit.[74] The superior court commented that the doctrine of res judicata was designed to avoid "waste and vexation of relitigating issues already decided between the same parties."[75] The court supported its reasoning by noting that the doctrine of res judicata coupled with the plea of autrefois acquit was based upon the maxim *nemo debet bis vexari pro eadem causa* (no man should be

66. Id. The defendant was brought before the lower court which entered a judgment in favor of the defendant's plea of autrefois. Id. The Commonwealth appealed. Id. See note 58 for definition of autrefois convict.

67. Id at 29-30.

68. Id at 30.

69. Id.

70. 151 Pa Super 555, 30 A2d 704 (1943). In the instant case, the defendant was indicted on a charge of adultery, and a jury found the defendant not guilty. *Moon*, 30 A2d at 707. Subsequently, the defendant was indicted for forcible rape allegedly perpetrated on the same woman who was the subject of the first indictment. Id. The defendant argued that the two indictments were identical, and therefore, barred by the doctrine of res judicata. Id at 708. However, the court held that the second charge was not barred because neither offense charged in the indictments against the defendant contained an essential element of the other. Id at 710.

71. Id at 709 quoting *Commonwealth v Rockafellow*, 3 Pa Super 588, 593 (1897).

72. Id.

73. Id.

74. Id at 709-10. See note 58.

75. Id at 710.

twice harrassed for same cause).[76] Accordingly, the court concluded that a verdict and judgment under an indictment would be considered a final adjudication of the question of guilt or innocence of the defendant.[77] Subsequently, the Pennsylvania Supreme Court denied the defendant's application for allocatur.[78]

Interestingly, the Pennsylvania state courts have not been confronted with many issues pertaining to res judicata in criminal law; thus, the courts did not fully apply the rules established by the superior court in *Moon* until twenty-two years later in *Commonwealth v Wydo*.[79] In *Wydo*, res judicata was applied to timely appeals in criminal law cases decided by a demurrer.[80] In this case, on June 17, 1964, the trial court entered an order sustaining the defendant's demurrer.[81] The Commonwealth appealed this order on December 18, 1964.[82] At the time of this case, Pennsylvania law provided that no appeal from a sentence or order would be allowed in any case unless the appeal was filed within forty-five days from the entry of the sentence or order.[83] The issue before the court was whether the Commonwealth could appeal an order sustaining a demurrer when it had failed to appeal within forty-five days.[84] The court held that the Commonwealth was permitted to appeal such an order; however, because the state had failed to make a timely appeal, the doctrine of res judicata barred this instant appeal.[85] The court asserted the rule that an order sustaining a demurrer was final and the Commonwealth had the right to appeal without any further action on the part of the court below.[86] The superior court noted that where no timely appeal was taken the matter became res judicata.[87]

Under very similar circumstances, the superior court affirmed

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76. Id at 710 citing *US v McConnell*, 10 F2d 927 (ED Pa 1926).

77. Id at 709 quoting *Rockafellow*.

78. Id at 712.

79. 205 Pa Super 62, 208 A2d 12 (1965).

80. *Wydo*, 208 A2d at 13.

81. Id at 13.

82. Id.

83. Id. The court referred to 12 Pa Stat § 1136 (Purdon 1953) which provided: "No appeal shall be allowed, in any case, from a sentence or order of any court of quarter sessions or oyer and terminer, unless taken within forty-five days from the entry of the sentence or order." 12 Pa Stat § 1136 (Purdon 1953) (repealed July 31, 1970).

84. *Wydo*, 208 A2d at 13-14.

85. Id.

86. Id at 14.

87. Id.

the holding in *Wydo* in *Commonwealth v Yahnert*.[88] The issue before the court was whether the Commonwealth could re-indict the defendant on a charge to which a demurrer had been sustained and no appeal had been taken by the Commonwealth.[89] The court concluded that the second indictment was barred.[90] Again, the court stated that an order sustaining a demurrer was final and the Commonwealth had the right to appeal without any further action on the part of the court below. The superior court commented that where no timely appeal was taken, the matter became res judicata.[91]

The superior court had also applied the doctrine of res judicata in *Commonwealth v Andrews*.[92] In *Andrews*, the court of common pleas dismissed criminal charges against a defendant because the Commonwealth had violated the defendant's right to a speedy trial pursuant to Rule 1100.[93] The Commonwealth failed to appeal this dismissal, but instead, petitioned the lower court to reconsider its refusal to grant an extension of time to commence the trial and its dismissal of the defendant.[94] Subsequently, the court below rescinded the dismissal and the criminal charges were reinstated against the defendant.[95] The superior court reversed this order because dismissal predicated on Rule 1100 had been a final order, and therefore, the reinstatement of the charges against the defend-

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88. 216 Pa Super 159, 264 A2d 180 (1970). In the instant case, the defendant was indicted on March 4, 1968. *Yahnert*, 264 A2d at 181. On March 21, the case went to trial, and the defendant entered a demurrer to the evidence. The judge sustained the demurrer. Id. The Commonwealth failed to appeal the decision, but instead, refiled the charges against the defendant on September 3, 1968. Id. Subsequently, the trial court convicted Yahnert. Id.

89. Id.

90. Id at 182.

91. Id. The dissent argued that the defendant failed to raise the defense of res judicata; thus, waiving the defense of autrefois acquit. Id (Wright dissenting). See note 58.

92. 251 Pa Super 162, 380 A2d 428 (1977).

93. *Andrews*, 380 A2d at 428. The relevant part of Rule 1100 requires that: "[T]rial in a court case in which a written complaint is filed against the defendant, where the defendant is incarcerated, shall commence no later than one hundred eighty (180) days from the date on which the complaint was filed." PaRCrP Rule 1100, 42 Pa Cons Stat (Purdon 1989).

In *Andrews*, the defendant on October, 25, 1974 was charged with failing to support his children. *Andrews*, 380 A2d at 428. On April 16, 1975, the Commonwealth petitioned the court for an extension of time to commence the trial against the defendant because the 180 day time period to begin a trial pursuant to Rule 1100 was ending. Id. The court granted this extension. Id. However, on July 29, 1975, the Commonwealth requested another extension to commence the trial. Id at 429. The court of common pleas denied this petition and the defendant was dismissed. Id.

94. Id at 429.

95. Id at 428.

ant would be barred by res judicata.[96] The court indicated that the proper procedure would have been to appeal the dismissal of the defendant.[97]

Therefore, without much precedent, the doctrine of res judicata was applied to the recent DUI case of *Commonwealth v La Belle*. However, the limited legal precedent that did exist never modified the elements of res judicata that were established in civil law.

Justice Steward, in his majority opinion in *Ashe*,[98] held that the doctrine of collateral estoppel was part of the defendant's Fifth Amendment guarantee against double jeopardy.[99] Even though aspects of the doctrine of res judicata could possibly be embodied in the Fifth Amendment, the essential elements of the doctrine still must be satisfied. In *La Belle*, the charges against the defendant had been dismissed because the state failed to comply with the five day rule. This decision was not an adjudication to the merits.[100] Furthermore, jeopardy never attached to the proceeding.[101]

The superior court outlined the rules for applying res judicata to criminal case in *Moon*, and the court required that for res judicata to apply there must be a judgment on the merits.[102] In fact, the application of res judicata to cases decided by a demurrer such as the *Wydo* and *Yahnert* cases were considered judgments on the merits.[103] The United States Supreme Court, in *Oppenheimer*, ap-

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96. Id at 429 quoting *Wydo*.

97. Id quoting *Commonwealth v Fox*, 181 Pa Super 292, 298 (1956).

98. See notes 46 - 56 and accompanying text.

99. See note 54. Judge Brosky, in his dissenting opinion in the superior court's *La Belle* decision, noted that both concepts of res judicata and collateral estoppel are "firmly intertwined with the constitutional protections of due process and double jeopardy." *La Belle*, 579 A2d at 1327 n 5. He further commented that "there is strong reason to believe that the United States Supreme Court would consider res judicata . . . embodied in the double jeopardy protection." Id. However, there was no legal precedent that supports Brosky's assertion that the entire concept of res judicata is part of the defendant's Fifth Amendment guarantee against double jeopardy. In fact, there is disagreement on whether the collateral estoppel aspect of res judicata is included within the Fifth Amendment.

100. *La Belle*, 579 A2d at 1324-25 n 2. Judge Brosky noted that dismissal based on the five day rule "can in no way be construed as an adjudication on the merits or the equivalent of an acquittal upon the facts." Id at 1325 n 2.

101. Jeopardy attaches when the jury is empaneled and sworn, and if the case is tried without a jury, jeopardy attaches when the first witness has been sworn. Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 24(1)(c) at 900-01 (West 1985).

102. The court noted that res judicata applied when every fact was conclusively determined. *Moon*, 30 A2d at 709. The court noted "[a] verdict and judgment, whether a conviction or acquittal, under an indictment, was a final adjudication of the question at issue—the guilt or innocence of the defendant. This question, thus being res judicata, cannot again be tried." Id.

103. Justice Holmes, writing the opinion in *Oppenheimer* declared "we do not suppose

plied res judicata to a criminal case where the statute of limitation had run, and likewise, the court barred the subsequent indictment because the former prosecution was considered a final judgment on the merits.[104] Therefore, the essential elements of res judicata are identical parties, final judgment, and judgment on the merits.[105]

Judge Brosky in his dissenting opinion for the superior court in *La Belle* argued that *Andrews*[106] provided precedent that a judgment on the merits was not necessary for the court to apply res judicata if the prior judgment had been final.[107] Judge Brosky concluded that because the court applied the doctrine of res judicata to a case which the court dismissed and a judgment on the merits had not occurred, the court's decision was of "great significance."[108] However, the defendant in *Andrews* was dismissed by a court of common pleas judge with prejudice which is considered a judgment on the merits.[109] In contrast, there was never any indication that the original dismissal of *La Belle* was with prejudice, and furthermore, *La Belle* was dismissed by a district justice not a

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that it would be doubted that a judgment upon a demurrer *to the merits* [emphasis added] would be a bar to a second indictment . . ." *Oppenheimer*, 242 US at 87.

104. Id. Holmes noted: "a judgment for the defendant upon the grounds that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits." Id.

La Belle in his Brief claimed that the fact the defendant in *Oppenheimer* was dismissed because the statute of limitations had run was controlling in his case. Appellant's Brief at 18-20. La Belle argued that a dismissal based on the fact that the statute of limitations had run was not a judgment on the merits; however, this is contrary to the holding of *Oppenheimer*. Appellant's Brief at 18-19.

105. Restatement of Judgments (Second) section 20 provides:

> (1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
>
> (a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or
>
> (b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or
>
> (c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

Restatement of Judgments (Second) § 20 (1982).

106. See note 92 and accompanying text. Actually Judge Brosky cites to *Commonwealth v Bellamy*, 251 Pa Super 165, 380 A2d 429 (1977) which is a clerical error. *La Belle*, 579 A2d at 1324; see also Appellant's Brief at 18-20.

107. *La Belle*, 579 A2d at 1324-25 n 2.

108. Id.

109. Restatement of Judgments (Second) § 20(b) (cited in note 105). The defendant in *Andrews* was dismissed based on Rule 1100. This was considered a dismissal with prejudice. See *Commonwealth v Senft*, 404 Pa Super 499, 591 A2d 318 (1991).

court of common pleas judge.[110]

Unlike Judge Brosky, Justice Flaherty in his majority opinion for the supreme court failed to cite any case where res judicata barred the Commonwealth from refiling the charges against a defendant where the statute of limitations had not run but the defendant was previously dismissed by a judgment that was not considered a judgment on the merits. In this case, the Pennsylvania Supreme Court went beyond the constitutional issue of double jeopardy and applied the doctrine of res judicata. In doing so, the court ignored the fact that an essential element of res judicata was not satisfied.

Pursuant to the court's decision, the Commonwealth must now appeal every final order from a district justice even if jeopardy has not attached. Furthermore, the Commonwealth must appeal even if the judgment was not on the merits. The only requirement is that the decision was final.

An example of an alternate sensible approach to the Pennsylvania Supreme Court was shown in *Williams v City of Peach Tree*.[111] In this case, the defendant filed a petition with the trial court to review his conviction of driving under the influence and driving without insurance.[112] However, the trial court dismissed the DUI petition for lack of jurisdiction because the defendant filed one application to review two separate convictions.[113] Subsequently, the defendant filed a separate petition seeking review of this DUI conviction.[114] The trial court dismissed this petition on res judicata grounds.[115] The court of appeals reversed because, although the first dismissal was a final appealable decision, it was not an adjudication on the merits.[116]

The *La Belle* case comes at a time when the Pennsylvania Supreme Court has struck down DUI convictions as unconstitutional. The court has also reversed DUI convictions on other grounds which have severely weakened Pennsylvania's drunk driving laws.

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110. The fact that La Belle was dismissed by a district magistrate and not a court of common pleas judge may not seem important. Nonetheless, the Commonwealth may not have been put on sufficient notice of the need to appeal a pretrial dismissal from a district justice as the Commonwealth would be by a dismissal in the court of common pleas.

111. 192 Ga App 121, 385 SE2d 680 (1989).

112. *Williams*, 385 SE2d at 680.

113. Id.

114. Id.

115. Id.

116. Id.

For example, in *Commonwealth v Eisenhart*,[117] the court held that a driver may revoke the implied consent to submit to a blood alcohol test as provided by the Pennsylvania Vehicle Code.[118] Subsequently, in *Commonwealth v Kohl v Danforth*,[119] the court held that Pennsylvania's Implied Consent Law violated the Fourth Amendment of the United States Constitution[120] and Article I, section 8 of the Pennsylvania Constitution.[121] Finally, in *Commonwealth v Jarman*[122] and *Commonwealth v Modaffare*[123] the court

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117. Pa , 611 A2d 681 (1992). In this case, the defendant crashed into a cement wall. *Eisenhart*, 611 A2d at 681. The arresting officer noticed that the defendant's eyes were dilated and the defendant had difficulty maintaining his balance. Id at 682. When the officer requested the defendant's license, he produced his social security card. Id. The officer also noticed an open beer can in the front seat of the car. Id. At the hospital, the defendant refused to submit to a blood test; nonetheless, the district attorney directed the hospital staff to conduct the test. Id. The defendant was found to have a blood alcohol level of .293% Id.

118. Id at 683. The Implied Consent Law provides that a driver of a motor vehicle in Pennsylvania has consented to blood or bodily fluid testing for the purpose of determining the presence of a controlled substance. 75 Pa Cons Stat § 1547 (Purdon 1992).

119. Pa , 615 A2d 308 (1992). These cases were consolidated on appeal to the state supreme court. In the *Kohl* case, the defendant was convicted of two counts of homicide by vehicle, two counts of driving under the influence, and reckless driving and driving at an unsafe speed. *Kohl*, 615 A2d at 308. The defendant's convictions arose from a one-vehicle collision when the defendant drove around a sharp bend and struck a pole and retaining wall. Id at 310. The accident resulted in the deaths of the defendant's two passengers. Id. The defendant, who was left unconscious because of the accident, was transported to the hospital. Id. Blood was taken from the defendant in the process of treating him for his injuries, and the police requested a sample of the defendant's blood. Id. A subsequent blood test revealed that the defendant had a blood alcohol level of .15% Id.

In the *Danforth* case, the defendant was involved in a one-car accident. Id. The defendant's passenger was killed in the accident. Id. The defendant claimed that her passenger attempted to remove her clothes while she was driving which caused her to loose control of her car. Id. The officer requested the defendant to submit to a blood alcohol test because the accident resulted in a fatality. Id at 311. The blood test revealed that the defendant had a blood alcohol level of .214% Id. The officer never informed the defendant that she was under criminal investigation. Id.

120. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

US Const, Amend IV.

121. Article I, section 8 of the Pennsylvania Constitution states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa Const, Art I, § 8.

122. 529 Pa 92, 601 A2d 1229 (1992). In this case, a state trooper stopped the defendant at 9:11 p.m. when the trooper noticed the defendant's car had a burned out headlight. *Jarman*, 601 A2d at 1229. Subsequently, the trooper detected an odor of alcohol on the

held that the defendant's blood alcohol level taken approximately one hour after the arrest was not an accurate reflection of the defendant's blood alcohol level at the time the defendant was stopped.[124]

The supreme court's decision in *La Belle* is clearly inconsistent with prior decisions. There was no violation of the double jeopardy clause; the elements of res judicata were not satisfied; and there was no succession of trials or repetition of litigation. But this decision has resulted in a travesty of justice.

What makes this holding even more alarming is the possible negative impact it will have upon resolving the problem of drunk driving and the damage drunk drivers inflict upon innocent victims. In 1990 in Pennsylvania, there were 16,382 alcohol related traffic accidents; almost 50% of fatal accidents involved alcohol; alcohol related accidents killed 737 people and injured 17,216; about 40,000 Pennsylvania citizens were arrested for driving under the influence.[125] In addition, in this case, an innocent victim has been rendered a quadriplegic because of La Belle's actions.

Pennsylvania Attorney General Ernie Preate[126] recently remarked that:

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defendant's breath. Id. The trooper performed a field sobriety test which the defendant failed. Id at 1229-30. The defendant was placed under arrest, and the police transported him to the hospital for a blood test. Id at 1230. The hospital staff tested the defendant's blood at 10:10 p.m. Id. The test revealed that the defendant had a blood alcohol level of .114% Id.

123. 529 Pa 101, 601 A2d 1233 (1992). In *Modaffare*, the defendant at 2:30 a.m. struck a parked car. *Modaffare*, 601 A2d at 1234. The defendant and his passenger were transported to the hospital to receive treatment for injuries sustained in the accident. Id at 1234. The state police requested the defendant to submit to a blood test, and the defendant complied with this request. Id. The hospital staff performed the blood test at 4:20 a.m. Id. The test revealed that the defendant had a blood alcohol level of .108% Id.

124. *Jarman*, 601 A2d at 1230; *Modaffare*, 601 A2d at 1235. These two decision have been labeled the "chug and drive" defense by State Representative Jeffery E. Piccola, Chairman of the House Judiciary Committee. United Press International, *Officials Pledge to Fight Court Decisions on Drinking Laws* (September 29, 1992). Piccola noted that it is now impossible for the Commonwealth to obtain convictions for DUI unless witnesses testify as to the exact time the defendant drank. United Press International, *Officials Pledge to Fight Court Decisions on Drinking Laws* (September 29, 1992).

125. Center for Highway Safety of the Pennsylvania Department of Transportation, *The Traffic Accident Facts and Statistics Report* (1992).

126. Attorney General Ernie Preate in 1988 criticized Judge Harhut of the Court of Common Pleas of Lackawanna County for dismissing La Belle on double jeopardy grounds. United Press International, *Superior Court Reverse DUI Decision* (October 3, 1988). Subsequently, the Lackawanna County's judges filed an ethics complaint against Preate with the Disciplinary Board of the Pennsylvania Supreme Court because of his harsh criticism of Judge Harhut. United Press International, *Superior Court Reverse DUI Decision* (October 3, 1988).

> We seem to have a supreme court that thinks of itself as a judicial Christopher Columbus on a constant voyage of discovery searching for new rights to grant to defendants.[127]

In this case, the supreme court searched and discovered the doctrine of res judicata. The Pennsylvania Supreme Court applied the doctrine of res judicata to the *La Belle* case by judicial fiat that resulted in a defendant escaping criminal charges without a trial to determine his guilt or innocence.[128] This case represents an insult to all victims of drunk drivers.

John M. Mulcahey

127. United Press International, *Officials Pledge to Fight Court Decisions on Drinking Law* (September 29, 1992).

128. Justice Burger in his dissenting opinion in *Ashe* considered the use of res judicata (collateral estoppel) in criminal law as "strange." *Ashe*, 397 US at 464 (Burger Dissenting). He argued that res judicata was justified in civil cases to avoid wasting judicial resources. Id. Res judicata was also used in civil law to conserve the resources of the parties of the suit. Id. Justice Burger asserted that in criminal cases "finality and conservation of private, public, and judicial resources are lesser values than in civil litigation." Id.